

RD AN No. 3539 (1940-G)
May 1, 2000

TO: Rural Development State Directors,
Rural Development Managers, and
Community Development Managers

ATTN: Program Directors and State Environmental Coordinators

FROM: James C. Kearney
Administrator
Rural Housing Service

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SUBJECT: Recent Environmental Compliance Issues

PURPOSE/INTENDED OUTCOME:

A number of questions continually arise or recur concerning environmental compliance and certain types of loan making activities in the Rural Housing Service (RHS) and the Rural Business-Cooperative Service (RBS), collectively referred to as the "Agency." The purpose of this Administrative Notice (AN) is to clarify the environmental requirements contained in RD Instruction 1940-G with respect to applications for equipment purchase, refinancing of existing debt, and requests for authorization of interim financing. Guidance for completing environmental reviews when construction is recently completed or still in progress at the time of application is also provided.

COMPARISON WITH PREVIOUS AN:

This is a reissue of RD AN No. 3465 (1940-G), dated April 30, 1999, which expires April 30, 2000.

IMPLEMENTATION RESPONSIBILITIES:

Notice to the applicant: When a preapplication or application is filed, the Agency should

EXPIRATION DATE:
May 31, 2001

FILING INSTRUCTIONS:
Preceding RD Instruction 1940-G

immediately notify the applicant that during the period of application review and processing, the applicant must not take any actions (for example, the initiation of construction) which would have an adverse impact on the environment or limit the range of alternatives to be considered by the Agency during the environmental review process.

In addition, the applicant should be notified that the environmental review must be completed prior to the issuance of a conditional commitment for guaranteed loans or prior to loan approval or obligation of funds for direct loans and grants. The Agency should ensure that all guaranteed lenders and relenders (such as intermediaries) clearly understand this requirement and should suggest that they provide this notice to their clients at the earliest possible moment, preferably at the first point of contact between them and their client. Refer to RD Instruction 1940-G, §§1940.309(e) and 1940.315.

Authorization to proceed with interim financing: Several questions have been asked about the interim financing referred to in RD Instruction 4279-B. If a guaranteed lender requests that the Agency authorize interim financing, the Agency must complete the appropriate level of environmental review prior to giving such authorization. Authorization for interim financing cannot be given “subject to” completion of the environmental review. This is true for both RHS and RBS program activities.

Equipment purchase: A proposal to purchase equipment for an existing facility is normally considered a categorical exclusion, however, this presumes that such a proposal is not part of larger action and that there are no related (connected) activities which must also be examined as part of the same environmental review. The most common example of related activities is when the equipment purchase is associated with the construction of a new facility or the expansion of an existing facility. In this example, the scope of the environmental review must be broadened to cover the environmental impacts of the construction, whether the construction is in progress or proposed, and irrespective of who finances the construction.

Refinance existing debt: A proposal to refinance existing debt for a facility is normally considered a categorical exclusion, unless there is ongoing or recently completed construction. In such a case, refer to the paragraph on Construction and the environmental review below.

Additional guidance may be found in RD Instruction 1940-G, §1940.317(d); in RD Instruction 1940-G, Exhibit H, II., Primary Beneficiaries and Related Activities; and in the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act at 40 C.F.R. part 1508.25.

Construction and the environmental review:

It is very difficult for the Agency to satisfy its environmental compliance responsibilities when construction is recently completed or still in progress at the time of application. Construction initiated after the preapplication or application is filed, but prior to completion of the environmental review, should not occur, if the notice to the applicant (discussed above) is given at the proper time.

If construction is in progress at the time of preapplication or application, the Agency must act quickly. First, the Agency must determine and document whether or not there is any evidence that the applicant initiated construction to avoid environmental compliance requirements. If evidence to that effect exists, then the Agency is not in a position to complete an environmental review or to consider a financial assistance request.

However, if the Agency is able to document that no evidence exists of any attempt to avoid environmental compliance, then the application is subject to the same environmental requirements as any other application. The following guidance applies when construction is still in progress:

The applicant must be informed that the Agency must fulfill its environmental compliance responsibilities and that if environmental compliance cannot be achieved, the approval for financial assistance may be in jeopardy.

The Agency must document in the environmental review, to the extent practicable, whether protected resources have been destroyed by the construction. Immediate steps must be taken by the Agency to identify any remaining resources and to put in place appropriate mitigation measures to protect remaining resources from the construction's progress.

Problems will frequently occur because the Agency is required to consult with other Federal and State agencies in order to identify what resources may have been destroyed, what remain, and to develop appropriate mitigation measures for those remaining. This may mean that the applicant must halt or delay the construction's progress until such consultations can take place. If the applicant is unwilling or unable to cooperate, or if the agencies with regulatory jurisdiction are unwilling to cooperate, the Agency may be unable to complete the environmental review.

Agencies with regulatory jurisdiction are not likely to be sympathetic and frequently tell us that "their opportunity to comment has been foreclosed by the initiation of construction." The best approach is to explain that there is nothing in Agency program regulations to prevent an applicant from initiating construction prior to filing a preapplication or application and that the Agency has found no evidence that the applicant initiated construction to avoid environmental compliance requirements

(assuming both these statements are true). They may or may not be willing to assist after this explanation.

The Agency should ensure that all lenders clearly understand that initiation of construction prior to completion of the environmental review may place approval of financial assistance in jeopardy. The Agency should also ensure that the lenders are providing early and prompt transmission of this fact to their clients.

If construction has been recently completed, the Agency must be able to determine and document that there is no evidence that the applicant initiated construction to avoid environmental compliance requirements. If the Agency is able to document that no such evidence exists, then the application is subject to the same environmental requirements as any other application involving an existing building. Refer to the previous paragraph on Refinance of existing debt.

To avoid the situations referred to above, the Agency should counsel applicants and consultants, and guaranteed lenders should counsel their clients, to consider their total financial assistance needs at the earliest planning stages of their proposals and to file applications with the Agency prior to the start of construction whenever possible. In addition, the Agency should ensure that all parties have a clear understanding of the Agency's environmental review process and their respective responsibilities while that review is in process. If there are any questions regarding these issues, they should be discussed with your State Environmental Coordinator. Otherwise, you may contact Sue Wieferich at 720-9647 or Brian LaFlamme at 720-9656, Program Support Staff, Rural Housing Service, or Ken Hennings, Rural Business-Cooperative Service, at (202) 690-3809.